Marzaini bte Zainuddin v Majlis Peguam Negara

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R–17B–17 OF 2006
ABDUL MALIK ISHAK, T SELVENTHIRANATHAN AND MOHD HISHAMUDIN JJ
21 SEPTEMBER 2006

Evidence — Admissions — Admission by appellant — Effect and nature of admissions

Legal Profession — Professional discipline — Misconduct — Professional Misconduct — Misappropriation of client's money — Admission of misappropriation of client's money — Whether Disciplinary Board's order justified in the circumstances

Legal Profession — Professional discipline — Suspension from practice — Suspension pending a full inquiry into the complaint lodged by the complainant — Duty owed by the Bar Council and Disciplinary Board to protect and safeguard members of the public

The appellant filed an appeal in encl 1 against the Disciplinary Board's ('DB's') decision to suspend the appellant from practice pursuant to s 94(4)(c) of the Legal Profession Act 1976 ('the Act') pending a full inquiry into the complaint lodged by the complainant, Madam Zubaidah binti Mohd Nasir ('Zubaidah') by way of a letter dated 18 March 2005. The facts leading to this appeal arose from a sale and purchase agreement entered into by Zubaidah, viz to sell her property for the sum of RM162,000.00. On 18 February 2005, the appellant confirmed receipt of the full purchase price of RM162,000.00 from the purchasers' financiers' solicitors. Subsequently, on 23 February 2005, the appellant issued to Zubaidah, a cheque for the sum of RM145,800.00 being the balance 90% of the purchase price but unfortunately, that cheque was dishonoured. Being dissatisfied, Zubaidah then demanded the payment that was due from the appellant. On the appellant's request, Zubaidah agreed to extend the period of payment to 18 March 2005. However, by 18 March 2005, the appellant failed to honour her undertaking to make the payment and this prompted Zubaidah to lodge a police report and a complaint against the appellant to the Bar Council vide letter dated 18 March 2005. Thereafter, the appellant attempted to pay Zubaidah a total of RM 150,000.00 in the following manner: (i) RM50,000.00 by way of an AmBank cheque number 501400 and (ii) RM100,000.00 by way of a Maybank cheque number 925322. On 25 March 2005, Zubaidah withdrew her complaint with the Bar Council. However, on 6 July 2005, Zubaidah re-lodged the complaint against the appellant to the Bar Council on grounds that (a) the AmBank cheque for RM50,000.00 was dishonoured; and (b) the Maybank cheque for RM 100,000.00 was not from the appellant's clients' account. It is pertinent to note that the appellant had accepted full responsibility in respect of Zubaidah's complaint and at the Hearing before the DB on 22 April 2006, the appellant admitted that she had used monies in her clients' accounts.

Held, dismissing the appeal with costs: **A**

(1) The written admissions by the appellant are certainly damning and receivable as evidence of the truth of the matter (see para 5).

(2) An admission is a statement, express or implied, oral or written, which is adverse to a party's case. An admission saves time in that the other side need **B** not lead evidence to prove it. It is conclusive against the party making it and it establishes the fact in question and do away with the necessity of leading evidence to prove it (see para 5).

(3) In deciding whether to suspend an advocate and solicitor for 'professional misconduct' both the Bar Council and the DB are required to balance the **C** interest of the appellant as an advocate and solicitor with the interest of the public at large as well as the interest of the legal profession. Both the Bar Council and the DB owe a duty to protect and safeguard members of the public by maintaining a high standard of conduct amongst legal practitioners (see para 8). **D**

(4) The phrase 'any dishonest act' appearing in s 94 (4)(c) of the Act must be given a purposive interpretation rather than a literal one (*Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2003] 1 MLJ 1 referred) (see para 8).

(5) The interest of the public at large as well as the interest of the legal profession **E** far outweigh the interest of the appellant. Both the Bar Council and the DB must be seen to be serious in matters pertaining to dishonest conduct of an advocate and solicitor especially in cases of misappropriation of clients' monies (see para 8).

(6) The courts have been consistent in its stand and have held that **F** misappropriation of client's money is a grave offence that demands severe punishment. In most cases, the courts would strike out the impugned advocate and solicitor from the Roll (see para 9).

(7) Here, the appellant is only being suspended. Nevertheless, the complaint **G** against the appellant is of a grave and serious nature. Taking into account the appellant's admission of misappropriating Zubaidah's money, it is my judgment that the DB's order is justified in the circumstances. The damage that may be caused to the reputation of the appellant pales in comparison to the damage that will inevitably be caused to the legal profession and the members of the public at large should the appeal in encl 1 be allowed (see para **H** 9).

(8) It goes without saying that the legal profession in this country must observe the highest possible standards of conduct. Nothing short of that would suffice. Disciplinary proceedings against recalcitrant advocates and solicitors are **I** designed to enable members of the same profession to decide on the fate of their fellow practitioners. This is simply because members of the same profession should know and appreciate better than anyone else the standards of conduct expected of the legal profession. The DB which consists of senior members of the Bar appointed under s 93(3) of the Act, thought it fit to

suspend the appellant based on the evidence presented to them. The DB should know better (*Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89 referred) (see para 10).

[Bahasa Malaysia summary

Perayu telah memfailkan rayuan dalam Lampiran 1 terhadap keputusan Lembaga Disiplin ('LB') yang menggantung perayu daripada mengamal menurut s 94(4) Akta Profesyen Undang-undang 1976 ('Akta') sementara menunggu inkuiri penuh terhadap aduan yang telah dibuat pengadu, Puan Zubaidah bte Mohd Nasir ('Zubaidah') melalui surat bertarikh 18 Mac 2005. Fakta-fakta yang membawa kepada rayuan ini adalah daripada perjanjian jual beli yang dimasuki Zubaidah yakni untuk menjual harta tanahnya untuk jumlah RM162,000. Pada 18 Februari 2005, perayu mengesahkan penerimaan sepenuhnya harga jualan RM162,000 daripada peguamcara kewangan pembeli. Kemudiannya, pada 23 Februari 2005, perayu telah mengeluarkan kepada Zubaidah, sekeping cek untuk jumlah RM145,800 yang merupakan baki 90% harga jualan tetapi malangnya, cek tersebut didapati tidak laku. Tidak berpuas hati, Zubaidah menuntut bayaran tertunggak daripada perayu. Atas permintaan perayu, Zubaidah bersetuju untuk melanjutkan tempoh bayaran kepada 18 Mac 2005. Walaubagaimanapun, pada 18 Mac 2005, perayu gagal untuk mematuhi akujanjinya bagi membuat bayaran dan ini telah mendorong Zubaidah membuat laporan polis dan aduan terhadap perayu kepada Majlis Peguam pada 18 Mac 2005. Seterusnya, perayu telah cuba membayar kepada Zubaidah satu jumlah sebanyak RM150,000 dalam keadaan-keadaan berikut: (i) RM50,000.00 melalui cek Ambank bernombor 501400 dan (ii) RM100,000 melalui cek Maybank bernombor 925322. Pada 25 Mac 2005, Zubaidah telah menarik balik aduan dengan Majlis Peguam. Walaubagaimanapun, pada 6 Julai 2005, Zubaidah membuat semula aduan terhadap perayu kepada Majlis Peguam atas alasan-alasan berikut (a) cek Ambank untuk RM50,000 tidak laku; dan (b) cek Maybank untuk RM100,000 adalah bukan daripada akaun klien perayu. Perhatian perlu diberikan bahawa perayu telah menerima dengan penuh tanggungjawab berikutan aduan Zubaidah dan Pendengaran di hadapan LD pada 22 April 2006, perayu mengaku bahawa beliau telah menggunakan wang dalam akaun anak guam.

Diputuskan, menolak rayuan dengan kos:

(1) Pengakuan bertulis perayu pastinya akan dikutuk dan boleh diterima sebagai keterangan berdasarkan kepada kebenaran perkara tersebut (lihat perenggan 5).

(2) Pengakuan adalah kenyataan, tersurat atau tersirat, lisan atau bertulis, yang menjejaskan kes pihak-pihak. Pengakuan akan menjimatkan masa dalam erti kata pihak satu lagi tidak perlu membawa keterangan bagi membuktikannya. Ia adalah konklusif terhadap pihak yang membuatnya dan ia akan mengasaskan fakta persoalan dan mengelakkan keperluan membawa keterangan untuk membuktikannya (lihat perenggan 5).

(3) Dalam menentukan sama ada untuk menggantung peguambela dan peguamcara kerana 'salah laku professional' kedua-dua Majlis Peguam dan LD hendaklah mempertimbangkan kepentingan perayu sebagai pengadu kerana

seorang peguambela dan peguamcara dengan kepentingan masyarakat awam dan juga kepentingan profesyen perundangan. Kedua-dua Majlis Peguam dan LD mempunyai tugas untuk melindungi dan menjaga ahli-ahli masyarakat awam dengan mengekalkan tindakan tahap (standard) yang tinggi dikalangan pengamal-pengamal undang-undang (lihat perenggan 8).

(4) Frasa 'tindakan tidak jujur' tertera dalam s 94(4)(c) Akta mestilah diberikan intepretasi maksud dan bukan melalui kaedah literal (*Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2003] 1 MLJ 1 dirujuk) (lihat perenggan 8).

(5) Kepentingan masyarakat awam dan juga kepentingan profesyen perundangan melebihi kepentingan perayu. Kedua-dua Majlis Peguam dan LD hendaklah dilihat serius dalam perkara-perkara berkaitan tindakan tidak jujur peguambela dan peguamcara terutamanya dalam kes-kes salah guna wang anak-anak guam (lihat perenggan 8).

(6) Mahkamah-mahkamah adalah konsisten dengan pendiriannya dan telah memutuskan salah guna wang anak guam adalah kesalahan yang berat yang memerlukan hukuman yang keras. Dalam kebanyakkan kes, mahkamah-mahkamah akan mengenepikan peguamcara dan peguambela yang dipertikaikan daripada Daftar Peguam (lihat perenggan 9).

(7) Disini, perayu hanya digantung. Namun begitu, aduan terhadap perayu adalah amat berat dan serius. Mengambil kira pengakuan perayu kerana menyalahgunakan wang Zubaidah, adalah penghakiman saya bahawa perintah LD adalah menepati dengan keadaan-keadaannya. Kerugian yang telah disebabkan kepada reputasi merudum perayu jika dibandingkan kepada kerugian yang tidak dapat dielakkan kepada profesyen perundangan dan masyarakat awam jika rayuan dalam lampiran satu dibenarkan (lihat perenggan 9).

(8) Tanpa perlu dinyatakan lagi bahawa profesyen perundangan dalam negara ini hendaklah diberikan tahap perlakuan yang amat tinggi. Tiada yang kurang daripadanya akan mencukupi. Prosiding disiplin terhadap peguambela dan peguamcara telah direkabentuk bagi membolehkan ahli-ahli daripada profesyen sama menentukan nasib rakan-rakan pengamal yang lain. Ini adalah kerana ahli-ahli daripada profesyen sama akan lebih mengetahui dan menghargainya daripada pihak lain tentang tahap hal ehwal yang diperlukan dalam profesyen perundangan. LD, yang terdiri daripada ahli-ahli peguam kanan yang dilantik di bawah s 93(3) Akta berpendapat bahawa ia adalah perlu untuk menggantung perayu berdasarkan kepada keterangan yang diberikan kepada mereka. LD sepatutnya tahu dengan lebih lagi (*Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89 dirujuk) (lihat perenggan 10).]

Notes

For cases on admission by appellant, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 101–105.

For cases on misconduct, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1787–1857.

For cases on suspension from practice, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1920–1922.

Cases referred to

Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia (2003) 1 MLJ 1 (refd)

Au Ah Wah v Lee Sow Keng & Ors [1981] 1 MLJ 303 (refd)

Law Society of Singapore v VCS Vardan [1999] 2 SLR 229 (refd)

Pepper v Hart [1993] 1 ALL ER 42 (refd)

Re A Solicitor [1936] 5 MLJ 241 (refd)

Re G.H. Conaghan [1961] 27 MLJ 81 (refd)

Wilson v Clyde Rigging and Boiler Scaling Co [1959] SC 328 (refd)

Legislation referred to

Legal Profession Act 1976 s 94(4)(c)

Victoria Martin (Victoria Martin & Associates) for the appellant.
Sheila Lingam (Shearn Delamore & Co) for the respondent.

Mohd Hishamudin J:

Introduction

[1] This is an appeal in enclo 1 filed by the appellant against the Disciplinary Board's ('DB's') decision to suspend the appellant from practice pursuant to s 94(4)(c) of the Legal Profession Act 1976 ('the Act') pending a full inquiry into the complaint. The DB's order dated 22 April 2006 is found at p 86 of the appeal record. The application under s 94(4)(c) of the Act was made by the Bar Council by way of a letter dated 24 February 2006 as seen at pp 1 to 3 of the appeal record. That s 94(4)(c) of the Act reads as follows:

> Power of Disciplinary Board to strike off the Roll, suspend for misconduct, etc:
>
> (4) Where an advocate and solicitor
>
> (c) is the subject of a complaint concerning any dishonest act committed by him in his capacity as an advocate and solicitor; and the Bar Council considers that it would be in the public interest or in the interest of his clients or of the profession that such advocate and solicitor be suspended from practice, the Bar Council may apply to the Disciplinary Board for an order suspending such advocate and solicitor from practice until further notice.

[2] The Bar Council's application is based on a complaint lodged by one Madam Zubaidah binti Mohd Nasir ('Zubaidah') by way of a letter dated 18 March 2005 as seen at p 4 to p 24 of the appeal record with the annexures annexed thereto. The factual background and the decision

[3] The facts are fairly simple and straightforward. It may be stated in this way. On 18 March 2005, Zubaidah lodged a complaint with the Bar Council. The gist of Zubaidah's complaint may chronologically be set out as follows:

(a) On 19 July 2004, Zubaidah entered into a sale and purchase agreement to sell her property for the sum of RM162,000.00 (see p 6 to p 11 of the appeal record).

(b) On 18 February 2005, the appellant confirmed receipt of the full purchase price of RM 162,000.00 from the purchasers' financiers' solicitors (see p 12 of the appeal record).

(c) (c) On 23 February 2005, the appellant issued a cheque for the sum of RM145,800.00 being the balance 90% of the purchase price to Zubaidah but, unfortunately, that cheque was dishonoured (see pp 13 to 16 of the appeal record).

(d) Being dissatisfied, Zubaidah then demanded the payment that was due from the appellant (see pp 18 to 19 of the appeal record).

(e) On the appellant's request, Zubaidah agreed to extend the period of payment to 18 March 2005 (see pp 20 to 21 of the appeal record).

(f) However, by 18 March 2005, the appellant failed to honour her undertaking to make the payment and this prompted Zubaidah to lodge a police report against the appellant (see pp 22 to 23 of the appeal record).

(g) Zubaidah, as alluded to earlier, also lodged a complaint against the appellant to the Bar Council by letter dated 18 March 2005 (see pp 4 to 5 of the appeal record).

(h) Thereafter, the appellant attempted to pay Zubaidah a total of RM 150,000.00 in the following manner:

(i) RM50,000.00 by way of an AmBank cheque number 501400 (see p 25 of the appeal record); and

(ii) RM100,000.00 by way of a Maybank cheque number 925322 (see p 84 of the appeal record)

(i) On 25 March 2005, Zubaidah withdrew her complaint with the Bar Council as reflected at p 27 of the appeal record and that letter was worded in this way:

> I refer to my letter of complaint to you dated 18 March 2005. I wish to withdraw the said letter dated 18th March 2005 and do not wish the Bar Council to investigate the said matter. I regret for all the inconvenience caused. Thank you.

(j) However, on 6 July 2005, Zubaidah re-lodged the complaint against the appellant to the Bar Council on the following grounds (see p 63 of the appeal record):

(i) that the AmBank cheque for RM50,000.00 was dishonoured (see p 85 of the appeal record); and

(ii) that the Maybank cheque for RM 100,000.00 was not from the appellant's clients' account, but, in fact, it was from one Dato' Lee Kam Sun (see p 84 of the appeal record).

[4] The appellant has accepted full responsibility in respect of Zubaidah's complaint (see pp 37 and 47 of the appeal record). She has admitted to the following state of affairs:

(a) that she was the sole partner in charge of the Kuala Lumpur's branch office;

(b) that all the files and accounts of the Kuala Lumpur branch office were solely handled by her since 2001;

(c) that Zubaidah's file was solely handled by her; and

(d) that the dishonoured cheques were solely signed by her.

[5] The written admissions by the appellant are certainly damning and receivable as evidence of the truth of the matter. An admission is a statement, express or implied, oral or written, which is adverse to a party's case. An admission saves time in that the other side need not lead evidence to prove it. It is conclusive against the party making it and it establishes the fact in question and do away with the necessity of leading evidence to prove it (*Wilson v Clyde Rigging and Boiler Scaling Co* [1959] SC 328). The value of an admission is demonstrated in the case of *Au Ah Wah v Lee Sow Keng & Ors* [1981] 1 MLJ 303, where Raja Azlan Shah CJ (Malaya) (as His Majesty then was) aptly said:

> Inche Abdul Kadir for Mr Au b'ased his appeal on one ground only. He complained that the proceedings were treated as civil proceedings but is yet punitive in nature. He contended that since no procedure has been prescribed criminal procedure should have been applied. Though he did not say so, the implication is that if criminal procedure was applicable, then the burden of proof on the complainant, and in this case the Bar Committee Pahang, would be the criminal and not the civil burden. The evidence before the Bar Committee consisted in the first place of an admission by Mr. Au that he had received a sum of money from a client. That was money that must be deposited in one or the other of the clients' accounts operated by him. It was not to be drawn out except for the client's purpose or to be returned to him. The other important item of evidence, backed by irrefutable evidence from the bank, was that at the material time, when Mr. Au wrote out a cheque for the specific purpose of returning this money to his client, there was no money in either or both his clients' accounts to meet this cheque. That cheque was stopped by Mr. Au for a reason not made known to the Bar Committee but as we have remarked earlier, if it had been presented, it would have been dishonoured for insufficient funds. On this evidence, it seems to us to be an unnecessary and unjustifiable quibble to contend that the Bar Committee wrongly required the complaint to be proved by proof on a balance of probabilities. If the Bar Committee had required proof beyond reasonable doubt, it could not as a reasonable body of men have come to any other conclusion than that this evidence had discharged this burden more than amply. We therefore dismissed the appeal with costs.

[6] Now, at the hearing before the DB on 22 April 2006, the appellant admitted that she had used monies in her clients' accounts. The cheques were dishonoured as a result of insufficient funds in her clients' accounts. The DB made an order suspending the appellant from continuing her legal practice as an advocate and

solicitor pending the inquiry. The appeal in encl 1 is against that order. It is an interim suspension and she is appealing to set it aside. The appellant is throwing herself at the mercy of this Court. It seems that the appellant had used the monies for the sake of her legal practice. The appellant had knowingly applied the monies for a wrong purpose. Such a conduct according to Thomson C.J. in *In Re G.H. Conaghan* [1961] 27 MLJ 81:

> ... may or may not amount to fraud. It may or may not amount to dishonesty. It may or may not be capable of being described by the euphemism of 'miscalculation' which has been used, but it certainly does amount to professional misconduct of the most serious character.

[7] I am concerned here with three interests to safeguard. In the words of Thomson CJ in the same case (see p 81 of the report):

> There is the interest of the solicitor; there is the interest of the legal profession as a whole; and there is the interest of the public. The legal profession occupies by law a privileged position. The continued existence of that position can only be justified if every individual member of the profession conforms to certain standards.
>
> The present respondent has fallen far short of these standards. In consequence he has done harm not only to himself but also to his client and to his profession as a whole and to the public for in the modern world it is in the public interest that there should be a legal profession observing the highest possible standards of conduct.
>
> In the circumstances we feel we have no option but to order the respondent to be struck off. There will be an order that he pays the costs of these proceedings which we assess at $500.
>
> *Order accordingly.*

[8] Thus, in deciding whether to suspend an advocate and solicitor for 'professional misconduct' both the Bar Council and the DB are required to balance the interest of the appellant as an advocate and solicitor with the interest of the public at large as well as the interest of the legal profession. Both the Bar Council and the DB owe a duty to protect and safeguard members of the public by maintaining a high standard of conduct amongst legal practitioners. The phrase 'any dishonest act' appearing in s 94(4)(c) of the Act must be given a purposive interpretation rather than a literal one (see the speech of Lord Griffiths in *Pepper v Hart* [1993] 1 ALL ER 42, as applied by the Court of Appeal in *Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2003 1 MLJ 1). Having accepted 'that the purpose of the Act is to protect the public from incompetent members of the legal profession' (per Gopal Sri Ram JCA in Akberdin's case at p 4), I have no choice but to confirm the order of the DB in suspending the appellant. Here, the interest of the public at large as well as the interest of the legal profession far outweigh the interest of the appellant. Both the Bar Council and the DB must be seen to be serious in matters pertaining to dishonest conduct of an advocate and solicitor especially in cases of misappropriation of clients' monies.

[9] It is a serious offence to misappropriate a client's money. The courts have been consistent in its stand and have held that misappropriation of client's money is a grave offence that demands severe punishment. In most cases, the courts would strike out the impugned advocate and solicitor from the Roll (*Re A Solicitor* [1936] 5 MLJ

241; *In re G.H. Conaghan*; *Au Ah Wah v Lee Sow Keng & Ors;* and *Law Society of Singapore v VCS Vardan* [1999] 2 SLR 229). Here, the appellant is only being suspended. Nevertheless, the complaint against the appellant is of a grave and serious nature. Taking into account the appellant's admission of misappropriating Zubaidah's money, it is my judgment that the DB's order is justified in the circumstances. The damage that may be caused to the reputation of the appellant pales in comparison to the damage that will inevitably be caused to the legal profession and the members of the public at large should the appeal in encl 1 be allowed.

[10] It goes without saying that the legal profession in this country must observe the highest possible standards of conduct. Nothing short of that would suffice. Disciplinary proceedings against recalcitrant advocates and solicitors are designed to enable members of the same profession to decide on the fate of their fellow practitioners. This is simply because members of the same profession should know and appreciate better than anyone else the standards of conduct expected of the legal profession. The DB, which consists of senior members of the Bar appointed under s 93(3) of the Act, thought it fit to suspend the appellant based on the evidence presented to them. The DB should know better. In the words of Raja Azlan Shah CJ (Malaya) in *Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89 at p 91:

> Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.

I do not propose to disturb the order of the DB. Accordingly, for the reasons as adumbrated above, I dismiss the appellant's appeal in encl 1 with costs.

[11] This is a unanimous decision of this court. This judgment has been shown in draft to Dato T. S. Nathan and Dato' Hj Mohd Hishamudin bin Hj Mohd Yunus JJ, and they both agreed with it.

Appellant's appeal dismissed with costs.

Reported by Eugene Daniel Louis